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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SHACHAR M. HADAR et al., Plaintiffs and Respondents, v. GERSHON LURIA, Defendant and Appellant.	A153420 (Contra Costa County Super. Ct. No. C16-00396)

Defendant Gershon Luria (Luria) appeals from an order granting summary adjudication in favor of plaintiffs Shachar Hadar and Esther Kolyer (plaintiffs) on their cause of action for partition of real property. The trial court had sustained plaintiffs' objection to the sole declaration submitted by Luria in opposition to the motion, finding it did not comply with the execution requirements of Code of Civil Procedure section 2015.5.[1] We reverse the summary adjudication in favor of plaintiffs and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The subject property is an apartment complex located in Richmond that the parties jointly purchased in January 2011. Plaintiffs own an undivided 50 percent interest in the subject property as tenants in common with Luria and his wife, Irit (defendants), who

[1] All statutory references are to this code unless otherwise noted.

own the other 50 percent interest. The parties verbally agreed that Luria would serve as property manager.

Difficulties in the parties' relationship began in 2015, and they negotiated (unsuccessfully) for the sale or defendants' purchase of plaintiffs' interest in the subject property. In March 2016, plaintiffs filed a verified complaint for partition of real property seeking a judgment partitioning the subject property by sale and dividing the proceeds between the parties.

Plaintiffs moved for summary judgment or alternatively summary adjudication for partition by sale of the subject property. In opposition, defendants, representing themselves in propria persona, filed a document entitled "Claimant's Response in Opposition to Motion for Summary Interlocutory Judgment or, in Alternative, Summary Adjudication for Partition by Sale of Real Property." On October 17, 2017, the trial court issued an order recognizing that defendants raised potentially material issues but failed to submit supporting evidence "through a declaration under penalty of perjury." The order cited various legal authorities, including section 2015.5. The court continued the matter to allow defendants to file and serve "a declaration of Gershon Luria under penalty of perjury" and a separate statement. The trial court also allowed plaintiffs to file and serve written objections, a reply separate statement, and a reply brief not to exceed five pages in length.

On October 24, 2017, defendants filed and served their opposition papers, including the "Statement of Gershon Luria in Opposition of a Motion for Summary Interlocutory Judgment or, in the Alternative, Summary Adjudication for Partition by Sale of Real Property" (hereafter the Luria declaration).[2] The Luria declaration stated in relevant part: "We agreed we will hold the property for a minimum of 10 years. Accordingly, we purchased a mortgage with a 10 year fixed period at the relatively high

[2] Luria did not include the Luria declaration in the record on appeal, but he attached a file-stamped copy of this declaration to his opening brief. On our own motion, we order the record augmented to include the Luria declaration attached as exhibit 1 to defendants' opening brief. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

cost of 6.7% interest, although a mortgage with a shorter fixed period would have been much less expensive." At the end of the declaration, Luria stated: "I declare under penalty of perjury and under oath that the forgoing is true and correct and that this declaration was executed on October 20, 2017."

In reply, plaintiffs filed a seven-page document that combined their five-page reply brief and evidentiary objections. Plaintiffs objected to the Luria declaration, asserting it failed to conform to the requirements of section 2015.5 by not stating the place of execution or invoking the laws of the State of California. Plaintiffs also argued that defendants' evidence of a verbal agreement to hold the subject property for 10 years did not raise a triable issue of material fact because an agreement to waive a tenant's right to partition property falls under the statute of frauds and therefore must be in writing.

After a hearing on the motion, the trial court entered an order denying plaintiffs' motion for summary judgment but granting their alternative motion for summary adjudication of the partition cause of action. The court found that plaintiffs carried their initial burden to show there was no defense because there was neither an agreement between the parties nor any waiver by plaintiffs barring partition. As relevant here, the court sustained plaintiffs' objection to the Luria declaration on the ground that it failed to invoke the laws of the State of California and did not state where the declaration was executed as required under section 2015.5 and *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601 (*Kulshrestha*). In light of the Luria declaration's inadmissibility, the court concluded defendants failed to submit evidence sufficient to raise a triable issue of material fact and declined to reach the statute of frauds question.

Luria timely appealed.

DISCUSSION

On appeal, Luria contends the trial court's ruling must be reversed because (1) it was based on an ex parte communication between plaintiffs and the court; (2) defendants fully complied with the court's instruction to provide a "declaration under penalty of perjury," and the court never advised them to state the place of execution or invoke the

laws of California; and (3) the declaration sufficiently indicated it was executed in California by setting forth defendants' California mailing address on the front page.

"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) " '[T]he weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard.' " (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141.) We liberally construe the evidence and resolve all evidentiary doubts in favor of the party opposing the motion. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181 (*Garrett*).)

We quickly dispose of Luria's first claim of error. Luria cites no evidence of any ex parte communications between plaintiffs and the trial court. We will not assume the court's citation of *Kulshrestha*—a published decision of the Supreme Court—stemmed from an ex parte communication simply because the case was not briefed. As for the court's citation of section 2015.5, the record shows that plaintiffs filed and served defendants with their reply brief and written objections citing section 2015.5. Plaintiffs' filing was not an ex parte communication. (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2.) Although Luria claims that defendants were not served with the last two pages setting forth the section 2015.5 objection and that the court clerk did not record these pages, this assertion is not supported by citation to any evidence in the record.[3] In short, Luria fails to present an adequate record showing that ex parte communications were made. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

Luria next contends he fully complied with the trial court's October 17, 2017, order, in that the court merely instructed him to provide a declaration "under penalty of perjury" and did not require him to indicate the place of execution or to invoke the laws

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[3] Luria also contends plaintiffs' combined reply brief and evidentiary objections violated the trial court's order limiting the reply brief to five pages. But the trial court's October 17, 2017, order permitted plaintiffs to file written evidentiary objections *in addition to* a maximum five-page brief. That plaintiffs combined their five-page brief with written objections into one document did not constitute a violation of the page limit for the brief.

of the State of California. But Luria ignores the portion of the October 17, 2017, order specifically citing section 2015.5. Read thusly, the court's order gave Luria the opportunity to submit a declaration that complied with section 2015.5 in all necessary respects.

We now turn to Luria's contention that the Luria declaration sufficiently complied with section 2015.5. Section 2015.5 allows the use of an unsworn declaration made under penalty of perjury to be used as evidence in place of a sworn statement whenever state law permits, such as in support of or opposition to a summary judgment motion. (*Kulshrestha, supra,* 33 Cal.4th at p. 609, citing § 437c, subd. (b)(1) & (2).) To enhance the reliability of such declarations, section 2015.5 "requires some acknowledgement on the face of the declaration that perjured statements might trigger prosecution *under California law*." (*Kulshrestha,* at p. 606.) Thus, the declaration must contain a certification that it is declared by the declarant to be true under penalty of perjury, "and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California." (§ 2015.5.) Section 2015.5 provides that the certification or declaration may "substantially" follow the format appearing in exemplars (a) and (b). Exemplar (a), for in-state declarations, contains a blank line for the date and place of execution adjacent to the signature line. (*Ibid*.)

In *Kulshrestha,* the Supreme Court explained that "courts do not find compliance with section 2015.5 to be both substantial and sufficient unless all statutory conditions appear on the face of the declaration in some form." (*Kulshrestha, supra,* 33 Cal.4th at p. 612.) Luria argues *Kulshrestha* is not controlling because it involved an out-of-state declaration. Although this is a correct statement of the facts of *Kulshrestha,* the court's analysis explicitly extended to declarations executed within the state. "[I]n-state declarations must satisfy the same substantive requirements as their out-of-state counterparts, including an express facial reference to California's perjury law." (*Kulshrestha,* at p. 611.) "[W]here the face of the declaration shows execution occurred in California, the statute presumes the declarant's knowledge that the act triggers

California law—i.e., that such understanding is adequately expressed by naming the 'place of execution' within this state." (*Ibid*.)

The Luria declaration stated the declaration was executed on October 20, 2017,but did not indicate the place of execution on the signature page. And though Luria stated the facts recited in his declaration were true and correct "under penalty of perjury and under oath," he did not specify they were made under penalty of perjury *under the laws of the State of California*.[4] Luria nevertheless contends the declaration was sufficient because its in-state execution was demonstrated by the address information appearing below Luria's name on the declaration's front caption page, which he filed in propria persona.

Read generously, *Kulshrestha* appears to provide some breathing room for this argument. In holding that section 2015.5's conditions must "appear on the face of the declaration in some form" (*Kulshrestha*, *supra*, 33 Cal.4th at p. 612 & fn. 5), the court inserted a footnote citing several cases including *Hirschman v. Saxon* (1966) 246 Cal.App.2d 589 (*Hirschman*), which upheld a declaration that set forth the place of execution "in the identical fashion approved in *McCauley v. Superior Court* [(1961)] 190 Cal.App.2d 562, 563 [(*McCauley*)]." (*Hirschman*, at p. 593.) In *McCauley*, the court found prima facie evidence of the place where a declaration was made based on the following language in the declaration's caption: " 'In the Justice Court of the Upland Judicial District County of San Bernardino, State of California' " and "State of California [¶] County of San Bernardino." (*McCauley*, at pp. 564, 565 & fn. *.) Again, viewing these cases generously, and resolving all evidentiary doubts in favor of the party opposing summary adjudication (*Garrett, supra,* 214 Cal.App.4th at p. 181), we conclude

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[4] We note that in the copy of the Luria declaration attached to Luria's opening brief, there is handwriting below Luria's signature that contains the required language of section 2015.5, but is dated November 13, 2017—the day the court granted summary adjudication. Luria does not contend this handwriting appeared in the copy of the Luria declaration filed on October 24, 2017, and was considered by the trial court in ruling on plaintiffs' objection.

the San Lorenzo address, which is listed below Luria's name on the caption page of the Luria declaration, constituted a sufficient facial reference to California for purposes of section 2015.5.

Having reached this conclusion, we find it appropriate to remand the matter to the trial court for further proceedings. As indicated, the trial court's October 17, 2017, order appeared to indicate that, if the Luria declaration were to be submitted in compliance with section 2015.5, then defendants raised potentially material issues. Moreover, the trial court declined to reach the statute of frauds issue due to its section 2015.5 ruling. We leave it to the trial court to resolve these issues in the first instance.

DISPOSITION

The order granting summary adjudication of the partition cause of action is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion. Luria shall recover his costs on appeal.

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Fujisaki, J.

WE CONCUR:

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Siggins, P. J.

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Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.